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Federal Communications Commission

DA 00-1079

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 00-79
Table of Allotments,)	RM-9802
FM Broadcast Stations.)	
(Jackson and Salyersville, Kentucky))	

NOTICE OF PROPOSED RULE MAKING

Adopted: May 10, 2000; Released: May 16, 2000

Comment Date: July 7, 2000

Reply Comment Date: July 24, 2000

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making and supplements jointly filed by Intermountain Broadcasting Company, licensee of Station WJSN(FM), Channel 293A, Jackson, Kentucky, and Wallingford Broadcasting Company, Inc., licensee of Station WRLV-FM, Channel 247C3, Salyersville, Kentucky ("petitioners").¹ Petitioners request the substitution of Channel 247C2 for Channel 293A at Jackson, Kentucky, and the modification of Station WJSN(FM)'s license accordingly; and the substitution of Channel 293C3 for Channel 247C3 at Salyersville, Kentucky, and the modification of Station WRLV-FM's construction permit accordingly.² Petitioners state their intention to apply for the respective channels, if allotted.

2. In support of their proposal, petitioners state that Station WJSN(FM) in Jackson, Kentucky, and Station WRLV-FM in Salyersville, Kentucky are Class A stations limited in power and coverage area. The stations are prohibited from increasing facilities on their own or adjacent channels due to spacing restrictions. Petitioners further state that this proposal requests an upgrade on a nonadjacent

¹ Wallingford Broadcasting Company, Inc. filed a one-step upgrade application (File No. BPH-980204IE) requesting the substitution of Channel 247C3 for Channel 247A at Salyersville, Kentucky, which was granted on February 3, 1999.

² On August 9, 1999, petitioners filed a request for withdrawal, and a subsequent request to disregard and dismiss the unauthorized "Withdrawal of Petition for Rule Making." The request is hereby granted.

channel which would normally allow for competing expressions of interest. However, in similar situations, the Commission has acknowledged that while not strictly adjacent channel relationships, the mutual exclusivity of the channels involved is similar to the scenario provided for in Section 1.420(g)(3) of the Commission's Rules. Section 1.420(g)(3) allows the modification of a station's license to a higher class channel if the channel is a co-channel or adjacent channel mutually exclusive with the existing license. However, the Commission has acknowledged that it will consider analogous proposals involving channel substitutions at other communities which would be necessary to create a mutually exclusive relationship required under Section 1.420(g)(3), and has determined to consider these "incompatible channel swaps" on a case-by-case basis. See Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channels, 60 RR 2d 114 (1986).³

3. We believe the proposed upgrade warrants consideration since it would enable Station WJSN(FM) at Jackson, Kentucky, to expand its coverage area. To accommodate the upgrade, we also propose the substitution of Channel 293C3 for Channel 247C3 at Salyersville, Kentucky. An engineering analysis has determined that Channel 247C2 can be allotted to Jackson in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.1 kilometers (8.2 miles) north at Station WJSN(FM)'s requested site.⁴ Additionally, Channel 293C3 can be allotted to Salyersville without the imposition of a site restriction at Station WRLV-FM's requested site.⁵ As requested, we shall also propose to modify the license of Station WJSN(FM) and the construction permit of Station WRLV-FM to specify operation on Channels 247C2 and 293C3, respectively. In accordance with Section 1.420(g)(3) of the Commission's Rules, any party expressing an interest in the respective channels should demonstrate why these proposals are not "incompatible channel swaps" such that their expressions of interest are foreclosed.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>
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³ An "incompatible channel swap" is a channel substitution for an upgrade and an accommodating substitution that are mutually exclusive and are uniquely available, i.e., there is no alternate channel of its class that is fully spaced from the station's site.

⁴ The coordinates for Channel 247C2 at Jackson are 37-40-19 North Latitude and 83-24-21 West Longitude.

⁵ The coordinates for Channel 293C3 at Salyersville are 37-49-05 North Latitude and 83-17-01 West Longitude. We note that an application (File No. BPH-19990512IL) was filed by Station WLFX(FM), Channel 294A, Berea, Kentucky, after the rulemaking petition in this proceeding. That application was 10.8 kilometers short-spaced to these reference coordinates for Channel 293C3 at Salyersville. The application was subsequently amended on March 7, 2000 under Section 73.215 to provide contour protection to Channel 293C3 at Salyersville. That application was granted on April 18, 2000.

	<u>Present</u>	<u>Proposed</u>
Jackson, Kentucky	293A	247C2
Salyersville, Kentucky	247C3	293C3

5. IT IS ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this Notice of Proposed Rule Making to the following:

Intermountain Broadcasting Company
1024 College Avenue
Jackson, Kentucky 41339
(Licensee of Station WJSN(FM))

Wallingford Broadcasting Company, Inc.
1030 Winchester Road
Irvine, Kentucky 40336
(Licensee of Station WRLV-FM)

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before July 7 ,2000, and reply comments on or before July 24, 2000, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John F. Garziglia, Esq.
Pepper & Corazzini, L.L.P.
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(Counsel for Intermountain
Broadcasting Company)

Mark N. Lipp, Esq.
Shook, Hardy & Bacon, L.L.P.
600 14th Street, N.W., Suite 800
Washington, D.C. 20005
(Counsel for Wallingford Broadcasting Company,
Inc.)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Room TW-A325, Washington, D.C.

20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Information Reference Center (Room CY-A257) at its headquarters, 445 12th Street, S.W., Washington, D.C.
20554.